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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
Filed March 13, 2000

JAMES R. LINDSEY; SUN CHA LINDSEY, and and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—VS.—

TACOMA PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA PIERCE COUNTY BOARD OF HEALTH; FREDICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA, a municipal corporation,

Defendants.

Before:

CANBY, BRUNETTI, and O'SCANNLAIN,
Circuit Judges.

ORDER

The mandate shall issue forthwith.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
CT/AG#: CV-97-05070-RJB
Filed March 17, 2000

JAMES R. LINDSEY; SUN CHA LINDSEY,
and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA PIERCE COUNTY BOARD OF HEALTH; FREDICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA,
a municipal corporation,

Defendants.

APPEAL FROM the United States District Court for the Western District of Washington (Tacoma).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is REVERSED.

Filed and entered NOVEMBER 19, 1999.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416
Filed February 14, 2000

JAMES R. LINDSEY; SUN CHA LINDSEY, and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA, a municipal corporation,

Defendants.

Before:

CANBY, BRUNETTI, and O'SCANNLAIN,
Circuit Judges.

ORDER; Concurrence by Judge O'Scannlain

ORDER

The opinion filed on November 19, 1999 and published at 195 F.3d 1065 is amended to include Judge O'Scannlain's specially concurring opinion attached hereto.

O'SCANNLAIN, *Circuit Judge*, specially concurring:

I concur in the thorough and well-reasoned opinion of the court, which faithfully applies Supreme Court precedent governing FCLAA preemption, as set forth in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). I write separately only to note that in recent decisions outside of the FCLAA context, the Court appears to be moving toward an approach to preemption issues that is more pragmatic (rather than strictly textual) and more deferential towards state law. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) (analyzing ERISA preemption).

The Court has made clear, however, that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917,

104 L.Ed.2d 526 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (rejecting the proposition "that other courts should ever conclude that [the Supreme Court's] recent cases have, by implication, overruled an earlier precedent"). Thus we must follow *Cipollone*, rather than collateral intervening cases addressing preemption in different areas of the law. With this observation, I join wholeheartedly in the opinion of the court.